



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10
1200 Sixth Avenue
Seattle, WA 98101

May 16, 2003

Via FAX Transmission
503-224-6148 and First Class Mail

Reply To
Attn Of: ORC-158

Clarence H. Greenwood, Esq.
Black Helterline
1900 Fox Tower
805 Southwest Broadway
Portland, OR 97205-3359

Re: Robert Kerivan, Howard Pickle and Bridgeview Vineyards, Inc.
EPA Docket No. CWA-10-2003-0012

Dear Mr. Greenwood:

This follows my telephone discussion with you on Friday, May 9, 2003. In that discussion I indicated that, after a thorough review of the proposed work plan and maps submitted on April 16, 2003, and after discussing these items with NOAA Fisheries, EPA has determined that the berm created without authorization in the channel to Sucker Creek must be removed. Removal of the unauthorized structure is the only way Mr. Kerivan can comply with the conditions of the compliance order issued on November 29, 2002. Upon reaching this conclusion, EPA realized that a site visit at this time would not be useful and therefore, cancelled the May 12th site visit.

Removal of the structure can occur when the water levels are lower, sometime between July and September. Mr. Kerivan must provide Yvonne Vallette with a time-table and plan for removing the structure by June 16, 2003.

As I also indicated during our May 9th conversation, EPA and NOAA Fisheries acknowledge Mr. Kerivan's concern about further bank erosion during high water events. However, the federal agencies believe that Mr. Kerivan can use bank barbs to achieve the desired erosion control. The use of such barbs are the most common and accepted method of controlling bank erosion. Though serving similar functions as the deflectors described in your April 16th letter, bank barbs would be designed differently than the deflectors described. Barbs constructed in the manner described in the attached Technical Notes from the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), should provide the erosion control Mr. Kerivan seeks while causing minimal disruption of water flow through the creek channel. Mr. Kerivan should contact the U.S. Army Corps of

Engineers (the Corps) to discuss conducting bank barb construction work under Nationwide Permit (NWP) 13, Bank Stabilization. Please note that the notification requirements under NWP 13 apply when work is proposed in a designated critical resource water. (See National General Conditions 13 - Notification and 25(b) Designated Critical Resource Waters).¹ NOAA Fisheries advises that if Mr. Kerivan agrees to incorporate the conservation measures within the Standard Operating Procedures for Endangered Species (SLOPES) programmatic consultation between the Corps and NOAA Fisheries, then the Corps should be able to issue the necessary permits to allow work to be conducted this year. Mr. Kerivan should contact the Corps for more information concerning these required conservation measures. Application to the Corps for the NWP can occur at the same time the removal of the structure is planned and executed.

As for your desire to view EPA's inspection report, a copy of the report is being provided to you under separate cover on Monday. I will also send to you via e-mail approximately 54 photographs taken by Yvonne Vallette by digital camera.

As for my providing you with copies of inspection reports and photographs taken by NOAA Fisheries, as I advised you during our call last week, I do not have control over the release of enforcement documents created by NOAA Fisheries. Although I originally indicated that I would check on whether the NOAA documents could be released to you, I now believe that your request for release of such documents should be directed to the NOAA Fisheries Enforcement Office. Please contact Marc Cline who participated in our meeting in December. Mr. Cline can be reached at 503-325-5934.

As for your request that Federal Rule of Evidence 408 apply to our settlement discussions, please note that Federal Rule 408 states that "[E]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations...." I agree that your willingness to discuss the settlement of pending

¹ Also, in response to the comment in your May 9th letter concerning the status of the coastal salmon listing in Oregon, it is EPA's understanding that the district court's ruling dissolving the threatened species listing for Oregon coastal coho has been stayed by the 9th Circuit Court of Appeals.

The threatened species listing therefore currently remains in effect. Also, to the extent that the district court's ruling only applies to Oregon coastal salmon, then it would not apply to this case because the listed species involved in this case is the Southern Oregon/Northern California coho salmon.

litigation concerning this matter cannot be used to prove liability for violation of the Clean Water Act.

However, thus far, the only information you have provided concerning this matter has been the proposed restoration plan and maps. Federal Rule 408 does not apply to documents that a respondent is required to submit in response to a compliance order.

Finally, as to your desire for a global settlement, as I indicated during our discussions last week, over the last few years, EPA has typically assessed an administrative penalty for situations such as this and we see no reason why this case should be the exception. EPA has not yet made a decision concerning what penalty would be appropriate to resolve this case. Such decision would likely not be made until sometime in June. However, please be aware that EPA would take into account any refusal to comply with a compliance order in calculating a proposed administrative penalty.

EPA would like to resolve this violation as quickly as possible taking into consideration your client's concern about bank erosion. For that reason we are willing to allow your client to meet the conditions of the compliance order by merely removing the unauthorized structure when the water level is low. Please note that in the compliance order we treated such removal as only an interim measure. We believe that your client's concerns about bank erosion can be met by applying to the Corps for a NWP 13 to construct bank barbs and take other measures allowed under the NWP.

Please notify me as soon as possible as to whether your client would still like to work cooperatively to resolve this violation.

Sincerely,

Deborah E. Hilsman
Assistant Regional Counsel

cc: Yvonne Vallette, EPA OOO
Jim Houseman, NOAA Fisheries
Chuck Wheeler, NOAA Fisheries
Niel Moeller, NOAA
Steven Springer, NOAA Fisheries